IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 638 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MEGHAJI @ MEGHU MAVJI MOTIKARA

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 638 of 2001
DHARMESH D NANAVATY for Petitioner No. 1
Mr. H.L. Jani, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 09/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr. D.D. Nanavaty for the petitioner and the learned AGP Mr. Jani for the respondents. In this petition under Article 226 of the the Constitution of India, the petitioner has challenged

the impugned order of detention dated 6th December, 2000 actually executed on 7th December, 2000 passed by the District Magistrate, Porbandar whereunder the petitioner has initially been ordered to be detained at the District Jail at Bhuj and subsequently has been transferred to the Central Jail, Sabarmati, Ahmedabad as Class II detenu. According to the grounds of detention communicated to the petitioner under section 9(1) of the Gujarat Prevention of Anti Social Activities Act, ("the PASA Act" for short)in all, five offences have been registered against the petitioner wherein last offence registered is dated 27th October, 2000 and the impugned order of detention has been passed by the detaining authority on 6th December, 2000 which has actually been executed on 7th December, 2000. As per the grounds of detention, the statements of the secret witnesses recorded on 30th October, 2000 and 1st November, 2000 by the concerned police authority were verified by the Dy. S.P. which is admittedly not the detaining authority. It is pertinent to note that at page 92, statement of the secret witness has been recorded by the police sub inspector of Kirti Mandir Police Station, Porbandar wherein there are blanks in respect of the date, time and other material and no details have been given in the statement of the secret witness. Same is the situation in respect of secret witness no.2 and 3 and no details were given and none of the said statements of the secret witnesses have been verified by the detaining authority. It is also necessary to be considered that in grounds of detention at page 15, internal page 3, in respect of details of secret witness no.1, there is blank about date and time. Similarly, at page 16, in respect of statement of secret witness no.2 and 3 also, there are blanks about the date and time. However, the detaining authority has, without verifying the said statements of the secret witnesses by himself, passed the impugned order of detention on 6.12.2000 which has actually been executed on 7.12.2000.

2. Learned advocate Mr. Nanavaty has raised various contentions while challenging the impugned order of detention. However, according to him, two contentions are enough for setting aside the impugned order of detention. He has submitted that the statements of the secret witnesses were verified by the Dy. S.P. and not by the detaining authority and, therefore, non verification of the statements of the secret witnesses by the detaining authority himself has vitiated the subjective satisfaction of the detaining authority and the claim of privilege without verifying the genuineness of the statements made by the secret witnesses is not justified. On this ground alone, according to him, the

impugned order is required to be quashed and set aside. He has also submitted that in the grounds of detention, there are blanks about date and time in respect of the statements of the secret witnesses. Similarly, in the copy of the statements of secret witnesses also, there are same blanks. He has, therefore, submitted that the detaining authority has passed the impugned order of detention without application of mind and in a routine manner. According to him, it also amounts to non communication of grounds and this has non communication of grounds has deprived the petitioner of his right to make an effective representation enshrined under Article 22(5) of the Constitution of India and, therefore, the impugned order is required to be quashed and set aside.

Learned AGP Mr. Jani has not been able to controvert the submissions made by Mr. Nanavaty that the statements of secret witnesses recorded by the police authority have not been verified by the detaining authority himself. He has also agreed that there are blanks not filled in by the detaining authority in the statements of the secret witnesses and similarly gaps in the grounds of detention. Learned AGP Mr. Jani has, however, supported the impugned order of detention by submitting that all these are technical defects or clerical error which can be condoned by the Court and looking to the merits of the matter, there were compelling circumstances justifying the detention of the petitioner and, therefore, this court should not interfere with the impugned order of detention.

I have considered the submissions made by both the learned advocates. I have considered the undisputed facts on record that the statements of the secret witnesses have not been verified by the detaining authority himself while forming the subjective satisfaction though claim of privilege was made under section 9(2) of the PASA Act which has affected the right of the petitioner to make an effective representation under Article 22(5) of the Constitution of India. While forming the subjective satisfaction, it is the duty of the detaining authority to satisfy himself about the genuineness of the statements made by the secret witnesses by examining such statements by himself. According to my view, this would amount to exercise of power without application of mind in a routine manner. While claiming privilege under section 9(2) of the PASA Act, some more care is required to be taken by the detaining authority to verify the genuineness of the statements of the secret witnesses by verifying such statements by himself. In this case, no such care has

been taken by the detaining authority before passing the impugned order of detention and therefore, it has adversely affected the petitioner's right to make an effective representation under Art. 22(5) of the Constitution of India. No reply has been filed by the detaining authority.

In case of Kalidas Chandubhai Kahar v. State of Gujarat and others reported in 1993(2) GLR pg. 1659, the Division Bench of this Court has held as under in para 6 of the report :

"6. His second contention is that the detaining authority has wrongly exercised the powers under section 9(2) of PASA Act and by such wrong exercise of powers, the detenu, right to make a representation under Art. 22(5) of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda City on 16th October, 1992. It has been pointed out by the learned AGP Mr. Y.M. Thakkar that the proposal in the case was made on 16th October, 1992 and the order of detention was passed on 17th October, 1992. It is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under section 9 (2) of PASA, a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art. 22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this,

there is a provision under sec. 9(2) carved out on the basis of Article 22(5) of the Constitution which provides that nothing in sub sec.(1) shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it confers the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under sec. 9(2) of the PASA. Looking to the facts and circumstances of the case, it is clear, as stated hereinbefore that the verified statements were also placed before the detainaing authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under sec. 9(2), as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day i.e. 17th October, 1992, nor is there any material to show as to how he examined the necessity of exercising the power under sec. 9(2). Under the circumstances, in our view, it is a wrong exercise of power under sec. 9(2) which has affected the detenu's right of making an effective representation under Article 22(5) of the COnstitution of India and, therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be quashed and set aside."

Therefore, according to my opinion, the impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 6.12.2000 is vitiated and resulted to quash and set aside. The detenu Meghji alias Meghu Mavji Motivaras who has been presently detained at the Central Prison, Sabarmati, Ahmedabad be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

13.6.2001. (H.K. Rathod,J.)
Vyas